Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-308 OF 1996
SHAIK DAUD, MOKHTAR SIDIN AND HAIDAR JJCA
6 JANUARY 2000

Companies and Corporations — *Winding up — Notice of demand — Validity of notice — Interest in notice was not specifically quantified — Whether notice was invalid to raise a statutory presumption — Companies Act 1965 s 218(2)(a)*

The respondant obtained a judgment in default against the appellant and issued a statutory notice of demand pursuant to s 218 of the Companies Act 1965 ('the Act') demanding for the judgment sum of RM334,118.79 together with interest thereon at the rate of 8% pa from the judgment date, 28 October 1988, until date of payment. The respondent subsequently presented a petition for winding-up the appellant company on the ground that the sums demanded in the notice had not been paid by the appellant company. The appellant disputed the validity of the s 218 notice but the High Court ordered the appellant company to be wound-up and the appellant appealed. The appellant contended that s 218(2)(a) of the Act should be interpreted strictly and that the sum due in the statutory notice should be clearly specified and quantified and that no sums whatsoever was to be left to be calculated by the recipient of the notice. The appellant also contended that the notice contained a sum in excess of what was actually due and that the notice was invalid. The respondent contended that the failure to quantify the interest due on the judgment sum did not render the statutory notice invalid, that the amount mentioned in the notice was not uncertain and that it was sufficient to comply with the requirements of s 218(2)(a) of the Act.

Held, dismissing the appeal with costs:

Althought the court took the view that s 218(2)(a) of the Act should be strictly interpreted, it made no difference whether the interest was quantified or not. As the respondent's notice was made in writing, signed and delivered by the respondent's authorized agent at the appellant's registered address and it specified the actual sum due which was undisputed, it was a good and valid notice. Even by the non-quantification of the interest in the notice, the respondent had strictly complied with the requirements of s 218(2)(a) (see pp 102F–G, 103C); *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313 followed.

[Bahasa Malaysia summary

Responden telah memperoleh satu panghakiman ingkar terhadap perayu dan mengeluarkan satu notis tuntutan statutori menurut s 218

A Akta Syarikat 1965 ('Akta tersebut') menuntut jumlah panghakiman sebanyak RM334,118.79 berserta dengan faedah pada kadar 8% setahun daripada tarikh penghakiman, 28 Oktober 1988, sehingga tarikh pembayaran. Responden kemudiannya telah mengemukakan petisyen untuk penggulungan syarikat perayu atas alasan bahawa jumlah yang dituntut di dalam notis tersebut masih belum dibayar B oleh syarikat perayu. Perayu telah mempertikaikan kesahan notis s 218 tetapi Mahkamah Tinggi telah memerintahkan syarikat perayu untuk digulungkan dan Akta tersebut sepatutnya ditafsirkan secara ketat dan bahawa jumlah yang terhutang di dalam notis statutori tersebut sepatutnya jelas menspesifikasikan dan menyatakan kuantiti dan bahawa tiada jumlah apapun yang sepatutnya tertinggal untuk C dikira oleh penerima notis tersebut. Perayu juga menegaskan bahawa notis tersebut adalah tidak sah. Responden menegaskan bahawa kegagalan untuk menyatakan kuantiti faedah yang tertunggak pada jumlah penghakiman tersebut tidak menyebabkan notis statutori tersebut tidak sah, bahawa jumlah yang disebutkan di dalam notis D tersebut bukannya tidak dipastikan dan bahawa ia adalah mencukupi untuk memenuhi keperluan s 218(2)(a) Akta tersebut.

Diputuskan, menolak rayuan tersebut dengan kos:

Walaupun mahkamah mengambil kira bahawa s 218(2)(a) Akta E tersebut hendaklah ditafsirkan secara ketat, ia tidak memberikan apa-apa perbezaan sama ada faedah tersebut telah dinyatakan kuantitinya atau tidak. Memandangkan notis responden dibuat secara bertulis, ditandatangani dan diserahkan oleh wakil berkuasa responden di alamat berdaftar perayu dan ia telah dinyatakan jumlah sebenar yang tertunggak yang tidak dipertikaikan, notis tersebut adalah notis yang F baik dan sah. Walaupun dengan faedah yang tidak dinyatakan kuantitinya di dalam notis tersebut, responden telah memenuhi secara ketat keperluan-keperluan s 218(2)(a) (lihat ms 102F–G, 103C); *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313 diikut.]

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Notes

For cases on statutory demand, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 892–893.

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Cases referred to

Perusahaan Jenwatt Sdn Bhd, Re [1990] 2 MLJ 178 (refd)
Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1992] 1 MLJ 313 (folld)
United Malayan Banking Corp Bhd v Richland Trade & Development I *Sdn Bhd* [2000] 1 MLJ 385 (refd)
Willes Trading Pty Ltd, Re [1977] 3 ACLR 582 (refd)
Yap Kim Kee & Sons Sdn Bhd, Re [1990] 2 MLJ 108 (refd)

Legislation referred to

Companies Act 1965 s 218(2)(a)

Appeal from: Civil Suit No D1–28–76 OF 1992 (High Court, Kuala Lumpur)

KS Narayanan (*Saranjit Singh* with him) (*KS Narayanan Assoc*) for the appellant.

YN Foo (*KW Moh* and *Faridah Abdullah* with him) (*Tengku Mohamed & Alan Lim*) for the respondent.

Shaik Daud JCA (delivering judgment of the court): This is an appeal by Malaysia Air Charter Co Sdn Bhd ('the appellant') against the decision of the High Court given on 6 May 1996 wherein the learned judge ordered the winding-up of the appellant on a petition presented by Petronas Dagangan Sdn Bhd ('the respondent').

On 18 October 1989, the respondent obtained a judgment in default of appearance against the appellant in the Kuala Lumpur High Court for a sum of RM334,118.79 together with interest thereon at the rate of 8% per annum from 28 October 1988 until date of payment. There was no effort made to apply to have the judgment in default of appearance set aside.

On 16 October 1991, the respondent's solicitors served on the appellant a statutory notice of demand pursuant to s 218 of the Companies Act 1965. Then on 27 February 1992, the respondent presented a petition for winding-up of the appellant, on the ground that the sums demanded in the notice have not been paid by the appellant company. The appellant disputed the validity of the s 218 notice. On 6 May 1996 the High Court ordered that the appellant be wound-up. By consent, the winding-up order was stayed pending appeal to this court.

The issue to be decided is whether s 218(2)(a) of the Companies Act 1965, is to be interpreted literally and strictly or liberally and widely.

The presumption under s 218(2)(a) that the company was unable to pay its debts and hence insolvent arose once it is established that:

(i) a sum exceeding RM500 was due;

(ii) a demand had been made in the manner provided by s 218(2)(a); and

(iii) the debtor company neglected to pay the amount demanded within three weeks.

It is the submission of learned counsel for the appellant that s 218(2)(a) ought to be interpreted strictly. He further submits that the statutory demand under s 218 requires the 'sum so due' to be clearly specified and quantified and that no sums whatsoever ought to be left to be calculated and/or ascertained by the recipient of the notice. Failure to do this would result in the statutory notice to be invalid to raise the statutory presumption under s 218(2)(a) of the company's inability to pay its debts. It is the contention of learned counsel for the appellant that the statutory notice of demand in the instant case contains a sum in excess of what is actually due and that the notice read with the petition and affidavits in support of the

petition shows that the sum demanded in the notice is excessive. In the event he contends that the notice is invalid to raise the statutory presumption under s 218(2)(a).

On the contrary, learned counsel for the respondent submits that failure of the respondent to quantify the interest due on the judgment sum, does not render the statutory notice invalid and that the amount mentioned in the notice is sufficient compliance with the requirements of s 218(2)(a) and not uncertain. In other words the submission on behalf of the respondent is that s 218(2)(a) ought not to be interpreted strictly but to be interpreted liberally or widely.

There are a number of cases both local and overseas on the interpretation of s 218(2)(a). In *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108, Zakaria Yatim J (as he then was) following the Australian case of *Re Willes Trading Pty Ltd* [1977] 3 ACLR 582 held that s 218(2)(a) must be interpreted strictly. He emphasized this approach later in *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178. Learned counsel for the appellant submitted before us that Zakaria Yatim J's decision in both the above cases was endorsed by the Supreme Court in *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313. He also submits that the Supreme Court adopted the strict interpretation of s 218(2)(a).

On our reading of *Sri Hartamas*, we find that the facts are on all fours with the facts in the present appeal. On 12 July 1988 the respondent obtained judgment against the appellant for the sum of RM5,197,060.82 together with interest and costs. By a letter dated 24 December 1988, the respondent sent to the appellant a demand under s 218(2)(a) of the Companies Act 1965. The demand was served on the appellant on 27 December 1988. As the appellant failed to pay the debts demanded, the respondent presented a petition dated 17 January 1989 to wind-up the appellant on the ground that the appellant had failed to comply with a statutory demand and was therefore insolvent and unable to pay its debts. The High Court granted the petition. It is pertinent at this stage to set out the statutory notice in the *Sri Hartamas* case in toto as it is similar to the notice of demand in the present appeal.

> To: Sri Hartamas Development Sdn Bhd
> 3rd Floor
> Wisma Low Kim Her
> 225–227 Jalan Tun Sambanthan
> 50470 Kuala Lumpur.
>
> Take notice that, we, Messrs Cheang & Ariff of 18 Floor, Plaza MBf, Jalan Ampang, 50450 Kuala Lumpur, solicitors for MBf Finance Bhd hereby requires you to pay to us the principal sum due to a final judgment dated 12 July 1988 obtained by MBf Finance Bhd against you in the High Court at Kuala Lumpur in Civil Suit No D4–23–2067–87 that is to say the sum of RM5.197,060.82 together *with interest thereon at the rate of 17% pa from 1 December 1986 until the date of realization* and cost at RM400 whereon execution has not been stayed or you must secure or compound for the aforesaid sum to the satisfaction of the said MBf Finance Bhd within 21 days of the date hereof and that the consequences of not complying with the

> requisition of this notice are that winding-up proceedings may be taken against you.
>
> Dated 24 December 1988.
>
> Sgd Messrs Cheang & Ariff
> Solicitors for MBf Finance Bhd
> (Emphasis added).

This statutory notice is similar to the notice in the present appeal except for the judgment sum which was RM334,118.79 'together with interest thereon at the rate of 8% pa from 28 October 1988 until date of payment.' Now the dispute in the *Sri Hartamas* notice was that it gave a period of 21 days, from the date of the notice whereas the section provides for three weeks after service of the demand to pay the sum due.

The Supreme Court while endorsing that s 218(2)(a) ought to be strictly interpreted went on to say that a demand does not fall within s 218(2)(a) if the amount demanded exceeds the sum actually due, and held that in that case the statutory demand was not bad or invalid, as it was made in writing and was signed and delivered at the registered address of the appellant and it had specified the actual amount due. We believe what the Supreme Court was saying is that the amount due is the judgment sum including interest. Although the statutory notice in *Sri Hartamas* did not quantify the interest due, nevertheless the Supreme Court held that it was a good and valid notice. In the final analysis the purpose of the statutory notice is to demand the judgment sum inclusive of the interest, quantified or otherwise, and if not paid within the stipulated period of three weeks, is to warn the debtor of an impending petition. Had the notice mentioned a sum in excess of the judgment sum then such notice would not have strictly complied with s 218(2)(a) and thus would be bad and invalid. We are bound by the decision in *Sri Hartamas*. Since the notice in the present appeal is similar with that in *Sri Hartamas*, we hold that the notice, although it did not quantify the interest due, was made in writing and was signed and delivered by the respondent's authorized agent at the appellant's registered address and it has specified the actual sum due which was not disputed, was a good and valid notice. Section 218(2)(a) only provides that a demand under the hand of the creditor or under the hand of his agent lawfully authorized, must be served on the company by leaving the said document at its registered address requiring the company to pay the sum due. It is our view that it makes no difference whether the interest is quantified or not.

A similar situation arose in *United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd* (unreported) where the Court of Appeal, following the Supreme Court's decision in *Sri Hartamas*, adopted the strict interpretation and held that the failure to quantify the interest does not render the demand of its real purpose and objective. The Court of Appeal further held that:

> In order for the demand to be effective, however, it must comply strictly with certain requirements as stipulated in the sub-section itself. The requirements are that the demand must be in writing under the hand of the creditor or his authorized agent, it must specify the sum due *(no mention is made of quantifying*

A *it to the last cent)*. The demand must be served on the company by leaving it at the registered office. If these requirements are met, I am of the view that the demand is valid and if after three weeks the company fails to pay the amount demanded then the law deems it to be unable to pay its debts whereupon a winding-up petition would follow. (Emphasis added).

B The decision on the interpretation of s 218(2)(a) in the *Richland*'s case was affirmed by the Federal Court at its sitting on 21 October 1999 though the appeal was allowed on a different ground, ie on the issue of the service of the notice of demand (see *United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd* [2000] 1 MLJ 385).

C In the present appeal we hold that the requirements of the section relating to demand has been similarly complied with. Therefore we see no merits in the argument that since the interest is not quantified the notice is bad and invalid. We would like to reiterate that even by the non-quantification of the interest in the notice, the respondent had strictly complied with the requirements of s 218(2)(a). We, therefore, dismiss the appeal with costs and order the deposit to go to the account of taxed costs.

D *Appeal dismissed with costs.*

Reported by Chin En Tek

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